

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HIMED DELI CORPORATION, TAHER HIMED	:	DETERMINATION
AND ABDO M. HIMED, A PARTNERSHIP, AND	:	DTA NOS. 814493
TAHER M. HIMED	:	AND 815244
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for	:	
the Period June 1, 1990 through May 31, 1994.	:	

Petitioners, Himed Deli Corporation, Abdo M. Himed and Taher M. Himed, a partnership, and Taher M. Himed, 441 3rd Ave., New York, New York 10016, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law.¹

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 8, 1997 at 10:30 A.M., continued at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 8 and 9, 1997 and continued to completion in Troy, New York on

¹The caption of the petition filed October 24, 1995 references only Taher Himed as the petitioner. The notices which are the subject of this petition were issued to Taher Mohamed Himed (as partner of Abdo M. Himed and Taher M. Himed, a partnership) (Notice No. L-01006292-3), Abdo M. Himed (as partner of Abdo M. Himed and Taher M. Himed, a partnership) (Notice No. L-01006293-2), Taher Mohamed Himed (as responsible person of Himed Deli Corporation) (Notice No. L-01006294-1) and Himed Deli Corporation d/b/a Himed Food Store (Notice No. L-010061123-3). The caption of the petition filed July 17, 1996 references Taher M. Himed and Abdo M. Himed; however, the assessments referenced on that petition were issued to Taher M. Himed only. Therefore, the petition filed July 17, 1996 does not pertain to Abdo M. Himed.

On December 26, 1996, the Division of Tax Appeals determined that it had no jurisdiction over Notice No. L-01006293 as a petition protesting same was not filed within 90 days of its issuance (*see, Matter of Himed Deli Corporation, Taher M. Himed and Abdo M. Himed, as officers*, Division of Tax Appeals, December 26, 1996, [DTA No. 814493]). Therefore, the term petitioners collectively refers to each person or entity to which a notice has been issued and for which a petition has been filed, except Abdo M. Himed (as partner of Abdo M. Himed and Taher M. Himed, a partnership).

December 16, 1997, with all briefs to be submitted by July 22, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared by Gopaljee Jaiswal, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Marvis A. Warren, Esq. and James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation issued the statutory notices in issue to the correct entities and individuals.

II. Whether, in the notices of determination issued to Taher Himed, as responsible officer of Himed Deli Corporation and as a person required to collect tax on behalf of Abdo M. Himed and Taher M. Himed, a partnership, certain periods are barred by the statute of limitations.

III. Whether the Division of Taxation properly utilized an external index to determine additional sales and use taxes due from Himed Deli Corporation and the partnership of Abdo M. Himed and Taher M. Himed.

IV. Whether penalties imposed under Tax Law § 1145(a)(1)(i) and (vi) should be canceled.

FINDINGS OF FACT

1. As a result of sales tax field audits of the books and records of retail grocery and delicatessen stores located at 441 Third Avenue New York, New York (“Third Ave. store”), and 545 Second Avenue, New York, New York (“Second Ave. store”), the Division of Taxation (“Division”) issued the following notices of determination.

On February 9, 1995, the Division issued to petitioner Himed Deli Corp. a Notice of Determination (Notice Number L-010061123-3) for sales and use taxes in the amount of \$110,494.25, plus penalties of \$41,563.18 and interest of \$39,126.53, for a total amount due of

\$191,183.96, for the period June 1, 1990 through May 31, 1994.² On the same date, the Division issued to petitioner “Abdo M. Himed & Taher M. Himed” a Notice of Determination (Notice Number L-010061124-2) for sales and use taxes in the amount of \$114,270.28, plus penalties of \$43,362.57 and interest of \$40,702.28, for a total amount due of \$198,335.13, for the period June 1, 1990 through May 31, 1994.³ Included in the explanation and instruction section of each of these notices was a statement that “the tax assessed has been estimated in accordance with provisions of section 1138 of the tax law.”

On February 21, 1995, the Division issued to petitioner Taher M. Himed, as a person required to collect tax on behalf of “Abdo M. Himed & Taher M. Himed,” a Notice of Determination (Notice Number L-010069292-3) for sales and use taxes in the amount of \$114,270.28, plus penalties of \$43,747.17 and interest of \$41,314.76, for a total amount due of \$199,332.21, for the period June 1, 1990 through May 31, 1994. On the same date, the Division issued to petitioner Taher M. Himed, as an officer or responsible person of Himed Deli Corp., a second Notice of Determination (Notice Number L-010069294-1) for sales and use taxes in the amount of \$110,494.25, plus penalties of \$41,934.62 and interest of \$39,717.90, for a total amount due of \$192,146.77, for the period June 1, 1990 through May 31, 1994.

2. Sometime in 1978 or 1979, Mohamed K. Himed opened Himed Food Store at 441 Third Ave., New York, New York. His sons, Taher Mohamed Himed (“Taher”) and Abdo Mohamed Himed (“Abdo”) assisted him in running the store. Mr. Himed’s health deteriorated

²This notice relates to the Third Ave. store. The notice was addressed to “Himed Deli Corp., Himed Food Store, 545 2 Ave, New York, NY 10016-6329.”

³This notice relates to the Second Ave. store. The notice was addressed to “Abdo M. Himed & Taher M. Himed, Himed Deli, 545 2 Ave, New York, NY 10016-6329.”

and on November 1, 1988, Himed Deli Corp. purchased the store from him.⁴ Subsequently, Mr. Himed returned to Yemen, his country of birth.

3. Sometime in 1988, the Second Ave. location was rented and the store opened.⁵ Taher testified that the leases for both premises were in his name and that of his brother Abdo. Taher could not recall the exact amount paid as monthly rent for each store; however, he estimated that, during the period 1990 through 1994, the monthly rent was about \$4,700 or \$4,800 for each store. The record does not include copies of the leases for either store.

4. On January 19, 1989, a Certificate of Registration was filed with the Division. According to this certificate, Himed Deli Corp., using the trade name Himed Food Store, was to have a principal place of business at 441 Third Ave. It was going to operate more than one place of business and would be filing a consolidated return covering all places of business.⁶ The corporate officers were listed as: Taher - president and Abdo - vice president. The corporation's bank account was to be maintained at Chemical Bank's 395 Third Ave. branch. Abdo, whose title was listed as "President" signed the certificate of registration.

Licenses in the name of Himed Deli Corporation were obtained in order to sell beer and cigarettes at the Third Ave. store.

5. During the period in issue, sales and use tax returns filed with the Division regarding the sales at the Third Ave. store were filed under the name of Himed Deli Corp./Himed Food Store, while the sales tax returns filed on behalf of the Second Ave. store were filed under the

⁴The terms of that transaction are not part of the record.

⁵The record is silent as to exactly when the premises at Second Ave. were rented or when the store opened.

⁶A Schedule of Business Locations, Form DTF 172, containing the list of the places of business is not part of the record.

name of Abdo M. Himed & Taher M./Himed Deli.⁷ All returns were signed by either Taher or Abdo. The sales tax returns filed on behalf of both stores were timely filed.

6. The Division commenced its sales tax field audit of both stores with the issuance of two appointment letters on August 4, 1993.⁸ The first letter is addressed to Himed Deli Corp., 441 3rd Avenue and the second letter is addressed to “Abdo M. Himed & Taher M. Himed Deli,” 545 2nd Avenue. Both letters list the same audit period, June 1, 1990 through May 31, 1993, and request that all books and records pertaining to the tax liability for the audit period be made available.

7. On September 20, 1993, on behalf of Himed Deli Corp., a vendor located at 441 3rd Ave., Abdo executed a consent extending the time for determination of sales and use taxes for the period June 1, 1990 through May 31, 1993 until September 20, 1994.⁹ On the same date, on behalf of Abdo M. Himed & Taher M. Himed Deli, a vendor located at 545 2nd Ave., Abdo executed a consent extending the time for determination of sales and use taxes for the period June 1, 1990 through May 31, 1993 until September 20, 1994.¹⁰

8. On October 27, 1993, both audits were assigned to Helaine Kotlar. On October 29, 1993, Ms. Kotlar sent two letters, the first addressed to Himed Deli Corp., 3rd Avenue, and the second addressed to “Abdo M. Himed and Taher M. Himed,” 2nd Avenue, confirming field audit appointments of New York State sales and use tax returns for the period June 1, 1990 through

⁷The sales tax return filed for the period September 1, 1991 through November 30, 1991 was not submitted on a preprinted form. Rather, this return was prepared by A.M. Gaisi. Typed at the top of this form under “Legal name” is “ABDO M. HIMED & TAHER M.,” and under DBA is “HIMED DELI.” Taher signed this return and his title was listed as “OWNER/PARTNER.”

⁸The appointment date and time are blank on both letters.

⁹Abdo’s title is listed as partner on this consent.

¹⁰The vendor name listed above the owner, partner or corporate officer signature line is “Abdo M. Himed & Taher M. Himed.” No title is listed under Abdo’s signature.

August 31, 1993, scheduled for November 18, 1993 at 9:45 A.M. at Abdo Gaisi's office located at 139 Court Street, Brooklyn, New York.¹¹ Each letter contained the request that all books and records pertaining to the sales and use tax liability for the audit period be available on the appointment date. The documents requested included "journals, ledgers, bank statements, daybook, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates." Enclosed with each letter was a power of attorney form, as well as Publication 130-F entitled "The N.Y. State Tax Audit - Your Rights and Responsibilities." In the letter addressed to "Abdo M. Himed and Taher M. Himed," the auditor stated that the enclosed power of attorney form "must be signed by a partner of the partnership and your accountant."

9. On November 18, 1993, the auditor met with Taher and Mr. Gaisi. During that meeting, Taher supplied a few bank statements for two accounts, one located at Citibank and the other located at Chemical Bank,¹² a few purchase invoices for July and August 1993 and a folder containing some legal documents including a certificate of authority.¹³ No accounting records, Federal income tax returns, sales invoices, cash register tapes or day books relating to either of the stores were presented to the auditor. At that meeting, Taher claimed the records for both stores were kept in books written in Arabic; however, he failed to produce either store's books. There is a conflict between the auditor's recollection of Taher's statements to her concerning the

¹¹Each letter refers to Mr. Gaisi as that particular entity's accountant. Although the Division made numerous requests throughout the audits for executed powers of attorney in favor of Mr. Gaisi, they were never submitted.

¹²According to the auditor's notes, the Citibank bank account number 12033597, in the name of Himed Deli Corp., was for the Second Ave. store and Chemical Bank account number 134223543, in the name of Taher Mohamed Himed, was for the Third Ave. store.

¹³The record is silent as to which store the certificate of authority pertained.

exact whereabouts of the two books and Taher's recollection of that conversation. According to the auditor, Taher claimed that the books were with his brother who was on vacation in Yemen. However, Taher testified that he had stated that his brother had put the books away in each store, but that he (Taher) did not know exactly where and had to contact his brother in Yemen to find them. At that meeting, Mr. Gaisi explained that withholding tax returns were not filed for either store. Taher never informed the auditor that the corporation at the Third Ave. address had been dissolved. However, Ms. Kotlar did recall seeing, among the documents in Mr. Gaisi's folder, a "request from the IRS for taxes," and on that request was the notation that the corporation was dissolved. (Tr., pp. 194-195.)

10. The auditor determined that the books and records for both stores were inadequate and that she would be unable to use them to conduct detailed audits. As a result of discussions with her team leader, Mayer Wiesen, and her group chief, Paul Golas, the auditor determined that an observation of each business premises was necessary in order to estimate taxable sales.

11. Prior to an observation test of a business premises, a survey is conducted. The survey, usually only 15 minutes or so, consists of an auditor walking through and observing the conduct of the business. The survey is used to get a general idea of the size and layout of a business premises, the number of employees and the type of items sold. The afternoon of May 3, 1994, Mayer Wiesen surveyed both stores. The record includes written summaries of Mr. Wiesen's observations concerning his survey of the stores. With regard to the Second Ave. store, Mr. Wiesen wrote:

Sign in front of store, "Cold Beer • Soda • Cold Sandwiches." Another sign states, "Special Coffee or Tea with Buttered Bagel or Roll .75." Budweiser. Newspapers in front stand.

One aisle in most of store. 2 at back. Meat & cheese counter. Back is [sic] refrigerators selling soda and beer. No dairy. No produce. Canned foods line shelf on long aisle. Some cleaning items and dog food.

Candy. Cigarettes. Coffee to go. Cups near front. Sandwich prices posted.

2 employees. Hours not posted. Busy shopping street. Residential neighborhood. 4 customers in store when auditor arrived. 85% Taxable.

Do mark-up test on beer, soda, cigarettes. Do obs test for prepared foods.

With respect to the Third Ave. store, Mr. Wiesen wrote:

Sign in front of store states, "Cold Beer • Soda • Sandwiches • Cigarettes • Newspapers." Coca-Cola & Camels advertisements in front.

Symmetrical of 2nd Av. Store. More conservative appearance. Less customers. Only 2 in store when auditor appeared in mid-afternoon. Newspapers in the store.

One aisle in most of store. 2 at back. Meat & cheese counter. Back is [sic] refrigerators selling soda and beer. Small ice creams in front freezer. Otherwise no dairy. No produce. Canned food line [sic] shelf on long aisle. Some cleaning items and dog food. Premises a little smaller than 2nd Av location.

Candy, Cigarettes prominently displayed. Coffee to go. Did not notice sandwich menu, but they are sold.

2 employees. Hours not posted. Busy shopping street. Residential neighborhood. 80% taxable.

Do mark-up test on beer, soda, cigarettes. Do obs test for prepared foods.

12. By letters dated May 16, 1994, the auditor advised Himed Deli Corp. and "Abdo M. Himed & Taher M. Himed" that their sales and purchase records were deemed to be inadequate, why they were deemed to be inadequate and that an observation of their respective business premises would be conducted during the period May 23, 1994 through June 3, 1994.

13. On May 23, 1994, during a telephone conversation with the auditor, Taher agreed to the use of observation tests of both locations sometime between May 24, 1994 and June 3, 1994.

14. Both stores are located in predominantly residential neighborhoods, a few blocks from each other. The neighborhood includes a number of hospitals, as well as a NYNEX office located between the two stores. The dimensions of the two stores are: Third Ave. - 52 feet by 8½ feet and Second Ave. - 58 feet by 10½ feet. Each store has only one cash register located on the counter near the entrance.

15. On May 26, 1994, a warm and sunny Thursday, observations of both stores were conducted. The observation tests commenced at 6:30 A.M. and concluded at approximately 9:30 P.M. The observation tests were conducted by a team of sales tax auditors.¹⁴ At both locations, the observing auditor stood near the cash register in order to watch and record, as well as avoid interfering with sales transactions. At both stores, the auditors observed taxable sales only and did not note the gross sales. On each store's tally sheets, taxable sales of the following items, among other things, were recorded: cigarettes, sandwiches, bagels, coffee, tea, soda, beer, candy and juice. According to the observation tally sheets, few sales were made at either store after it began to rain about 7 P.M. Review of the tally sheets also reveals there were many beer sales at both locations.

16. The original observation tally sheets for both stores are part of the record. On both sets of observation tally sheets, the following titles appear at the top of each page: Time, Dollar Amt Taxable Sale, Description, Coffee, Cigarettes, Sandwiches, Soda and Beer. Notations appear under the appropriate columns on the lines on each page. Some of the auditors placed short lines in the specific columns relating to the items sold, while others wrote out the type of

¹⁴The team members were: Helaine Kotlar, Arlene Irvin, Nicola Woods, Christopher Bugaj, Chae Kuo, Robert Steinhaus and Mario Sabillon. Ms. Kotlar, as auditor assigned to the two cases, observed at both locations. The group chief, Paul Golas, was briefly at each location early in the morning.

item or items sold in the description column.¹⁵ The majority of the auditors recorded their observations in pencil. Some of the very lightly written lines on numerous pages of both sets of observation tally sheets have been overwritten in pencil.¹⁶ Over-rings were noted at both stores. At the Second Ave. store, auditors also noted transactions which were not rung up. Attached to the last page of the Second Ave. observation packet are cash register tapes for that store, as well as one cash register tape for the Third Ave. store.¹⁷ Only one cash register tape, containing only the date 05-26-94 at the top, is attached to the last page of the Third Ave. observation packet. It was taken at 9:30 P.M. by Mario Sabillon. At the end of the tally sheets, there were notations concerning the fact that employees at both stores failed to clear the register between sales and how that failure affected the total gross sales figures on the cash register tapes at the end of the day.

17. Within a day or two of the observation tests, Ms. Kotlar reviewed each set of tally sheets. She eliminated any nontaxable items which had been listed in error and in instances where she could not read a particular team member's handwriting, after consultation with that person, overwrote the items in order to darken them. The auditor then totaled each set of observation tally sheets. The auditor did not rely on the cash register tapes attached to the tally sheets because of inaccuracies. With respect to the Second Ave. store, the taxable sales for the

¹⁵The Second Ave. observers kept the tally by set categories of items being sold. However, the Third Ave. observers did not do that until the third shift.

¹⁶The overwriting is different from the faint writing which can be seen underneath and was done by Helaine Kotlar. (*See*, Finding of Fact "17.")

¹⁷The name of the store, "HIMED DELI," along with the 2nd Ave. address and telephone number are faintly printed at the top of each tape along with the incorrect date of "05-26-95." The tape for the Third Ave. store contains only the date "05-26-94" at the top.

one-day observation totaled \$1,087.32. The taxable sales for the one-day observation of the Third Ave. store amounted to \$1,052.63.

18. During the observation tests, none of the auditors observed, at either store, any sign which stated that sales tax was included in the price of an item. Ms. Kotlar observed that, most of the time, sales tax was not charged. However, she did see some cash register receipts from the stores which indicated that sales tax was a separate charge. At the hearing, Ms. Kotlar stated that it was her belief that the vendors were unaware of what items were supposed to be taxable. She observed that neither store's employees gave cash register receipts to customers. At both stores, the auditors observed that inventory purchases were made in cash.

19. Petitioners were not given copies of either store's tally sheets at the conclusion of the observation day. However, the auditor included copies of both sets of tally sheets in the audit work papers which accompanied the statements of proposed audit adjustment (*see*, Finding of Fact "22").

20. On July 28, 1994, on behalf of Himed Deli Corp., a vendor located at 441 3rd Ave., Taher, as officer, executed a consent extending the time for determination of sales and use taxes for the period June 1, 1990 through November 30, 1991 until March 20, 1995. On the same date, on behalf of Himed Deli Corp. A/K/A Abdo M. Himed & Taher M. Himed, a vendor located at 545 2nd Ave., Taher, as "partner/officer," executed a consent extending the time for determination of sales and use taxes for the period June 1, 1990 through November 30, 1991 until March 20, 1995.

21. The auditor issued two statements of proposed audit adjustment dated October 12, 1994, the first in the name of Himed Deli Corp. A/K/A Abdo M. Himed & Taher M. Himed for the Second Ave. store and the second in the name of Himed Deli Corp. for the Third Ave. store.

The Second Ave. store's statement proposed additional tax due in the amount of \$114,270.28, plus penalties in the amount of \$41,748.71 and interest of \$35,937.63, for a total amount due of \$191,956.62. The Third Ave. store's statement proposed additional tax due in the amount of \$110,494.25, plus penalties in the amount of \$40,375.90 and interest of \$34,764.97, for a total amount due of \$185,635.12. The proposed penalties on both statements were computed pursuant to Tax Law § 1145(a)(1)(i) and (vi).

22. Accompanying each statement were the copies of the audit work papers used to compute that statement's tax liability, as well as a cover letter. In that letter, the auditor advised that a closing conference could be scheduled and to contact her in order to schedule one. The letter also advised that all available records, including, among other things, ledgers, journals, daybook, cash register tapes, sales invoices, purchase invoices and Federal income tax returns for the extended period June 1, 1990 through May 31, 1994, should be brought to the closing conference.

The auditor calculated the Second Ave. store's additional tax liability in the following manner. The auditor multiplied the one-day taxable sales total of \$1,087.32 by 91 (7 days X 13 weeks) to determine quarterly taxable sales in the amount of \$98,946.12. The auditor projected the quarterly taxable sales figure over the four-year audit period, applying a rate of 5% to reduce taxable sales for each prior year,¹⁸ and computed total adjusted taxable sales in the amount of \$1,424,824.12. To calculate the tax due on the additional taxable sales, the auditor subtracted the total taxable sales reported for the audit period from the total adjusted taxable sales

¹⁸The 5% factor was to account for inflation, price increases, popularity variances and weather variances. It was not based on a published price index; rather, it was used by the auditor because her supervisor thought it was fair and instructed her to use it. The auditor used 100% of quarterly taxable sales for the two audit quarters in 1994, 95% for the four quarters in 1993, 90% for the four quarters in 1992, 85% for the four quarters in 1991 and 80% for the two quarters in 1990.

(\$1,424,824.12 - \$39,730.00), multiplied the additional taxable sales by 8.25% (statutory rate) and computed the total tax due on the additional taxable sales to be \$114,270.28. The auditor computed the Third Ave. store's additional tax liability in a similar manner. Multiplying the one-day taxable sales of \$1,052.63 by 91, the auditor determined quarterly taxable sales to be \$95,789.33. The auditor projected the quarterly taxable sales figure over the four-year audit period, applying a rate of 5% to reduce taxable sales for each prior year, and computed total adjusted taxable sales in the amount of \$1,379,364.00. The auditor computed a total tax due on additional sales in the amount of \$110,494.25 by subtracting total reported sales of \$40,040.00 from total adjusted sales of \$1,379,364.00 and multiplying the remainder, total additional sales, of \$1,339,324.00 by 8.25%. In calculating the sales tax liabilities, the auditor did not consider the size of the stores relevant.

23. Taher disagreed with the audit findings for both stores. On November 2, 1994, Taher, accompanied by Mr. Gaisi,¹⁹ met with the auditor. At that meeting, he did not challenge the accuracy of the sales determined on the one-day observation tally sheets for either store. Rather, Taher claimed that sales at both stores were higher than usual on the day of the observations. He again stated that he kept his records in books written in Arabic. Taher failed to bring any records to this meeting. Taher made a December 1, 1994 appointment to present additional records or any evidence to refute the audit findings.

24. Taher failed to keep his appointment with the auditor on December 1, 1994. He did not telephone to cancel or reschedule this appointment. No records were made available to the auditor.

¹⁹Mr. Gaisi again refused to sign a power of attorney form.

25. The auditor never saw any type of agreement, either for a partnership or for any type of legal entity, concerning the Second Ave. store. She determined that a partnership was running the Second Ave. store based on what was in the Division's sales tax records.

26. The audit work papers include Ms. Kotlar's Tax Field Audit Record ("audit log"), the log of her contacts and comments concerning the audit, for the Second Ave. store. Review of that audit log reveals that the auditor consulted with her group chief twice, once in July 1994 and a second time in January 1995, about the correct name to place on the consent and the statutory notice.

27. As noted in Finding of Fact "1," the Division issued notices of determination with respect to the audits conducted of the two stores. Subsequent to the issuance of the notices of determination in issue, Taher requested that the Division conduct additional observation tests of both stores. The Division did not honor his request.

28. In support of their position, petitioners presented Taher as a witness. At the hearing, he supplied the following background information. In 1972, he and his brother Abdo came to the United States, joining their father in California. While in California, both Taher and Abdo briefly attended school. Taher's formal education ended about the 7th or 8th grade. Prior to coming to the United States, both brothers attended school in Yemen where they learned to read and write in Arabic. At some point, Taher, Abdo and their father moved to New York State where, in or about 1978 or 1979, Mr. Himed opened the Third Ave. store. Both Taher and his brother assisted their father in running the Third Ave. store until November 1, 1988 when Himed Deli Corporation purchased the store.

29. The Himed Deli Corporation was incorporated on July 21, 1988, by Taher's attorney, a member of the law firm of Santangelo and Cohen. Although his attorney obtained licenses and

registrations in the corporation's name, Taher testified that the Third Ave. store's business was not conducted in corporate form. According to Taher, no corporate meetings were ever held, no corporate officers were appointed, no income tax returns were filed on behalf of the corporation and the corporation made no sales. Taher testified that he asked his attorney to "cancel" the corporation; however, he did not know whether or not his attorney had actually dissolved the corporation until he (Taher) consulted Mr. Gaisi in 1990. At the hearing, Mr. Gaisi testified that he, on Taher's behalf, instructed the attorney to dissolve the corporation. However, he was not sure what steps the attorney took to cancel the corporation.

On May 12, 1990, Taher, in response to a Notice of Failure to File Corporation Tax Form (CT-3/4) for June 30, 1989, advised the Division that the corporation had been dissolved. According to the New York State Department of State, Himed Deli Corp. was dissolved by proclamation of the Secretary of State on March 24, 1993 pursuant to Tax Law § 203-a, and, as of June 11, 1997, that dissolution has not been annulled.

30. In response to whether or not he had a formal partnership agreement with his brother, Taher responded in the negative. He explained that their agreement was just as a family, with each brother co-owning both stores.

Taher explained that his primary responsibility was the Third Ave. store, while Abdo's was the Second Ave. store. However, because they took turns visiting their respective families in Yemen, the brother who remained in the United States split his time between the two stores. During the audit period, Abdo spent much of his time in Yemen because of ill-health, and in his absence left the running of the two stores to Taher. Taher stated that they were assisted in the operation of the two stores by Abdo's son and two of Taher's sons. He did not pay a salary to any of these individuals.

With respect to the general operation of the stores, Taher stated that the stores were open from approximately 7:00 A.M. until 8:00 P.M., that they closed earlier on weekends and that they were open half-days on holidays. Taher claimed that during the early part of the audit period, the Second Ave. store's sales were lower because it only opened in 1989. He also stated that Thursdays and Fridays were usually the busiest days of the week because of a nearby NYNEX office's Thursday payday, but that weekend business at the stores was slow. Taher claimed that sales on holidays amounted to about 50% less than on an average day. According to Taher, the sales at the stores varied depending on weather conditions. He claimed that beer sales decreased in the winter and increased in the summer. He estimated that average beer sales consisted of five to seven cases of beer a day.²⁰ He explained that between 1989 and 1995 there was an increase in the cost of goods sold by the stores and that the average inventory for the stores was approximately \$5,000 to \$6,000.²¹ The majority of inventory purchases were made in cash and inventory was purchased on a regular basis. During the period in issue, his markup on sandwiches was approximately 175% to 200%. He estimated that 30% of the items sold were nontaxable. He testified that he gave sales receipts to customers when they asked.

31. Taher explained that each store maintained a separate sales journal, written in Arabic, in which the total gross sales for each day were recorded. At the end of the day, the cash register totaled the gross sales for the day and either his son or his nephew, under either Abdo's or his supervision, would write that total in Arabic in the book relating to that particular store. At each store, the cash register tape showing the total gross sales would then be placed in a shopping bag near the cash register.

²⁰It is unclear from the record whether his estimate was for both stores or only one store.

²¹It is unclear from the record whether his estimate was for both stores or only one store.

32. The record includes two spiral notebooks, written in Arabic, which petitioners characterize as the sales journals for the two stores. The sales journal for the Second Ave. store contains entries for the period January 1990 through May 1994, while the sales journal for the Third Ave. store contains entries for the period January 1990 through June 1994. Each month is listed on a separate page in each book. While there are entries for the individual days of the month, those daily figures have not been totaled. The small spiral notebook designated as the Arabic sales journal for the Second Ave. store includes pages containing a person named Abdul's Spanish and English homework assignments, as well as some drawings and paragraphs written in Arabic. The Arabic sales journal for the Third Ave. store also contains some drawings and the phrase "HAPPY HOLIDAY" in the beginning of the book. Taher explained that the drawings and jottings written in the front of both books were made by his son and his nephew, who were teenagers at the time and did not understand the importance of the two books. According to Taher, these same individuals were the ones who recorded the daily sales in each book because they could write in Arabic and his knowledge of written Arabic was limited. The individuals who actually made the entries in both books did not testify at the hearing. The record does not include any of the cash register tapes relating to the numbers written in the two books.

33. Petitioners submitted English translations of the Arabic books into the record. These translations were prepared in either 1996 or 1997 by Mr. Gaisi and his wife, Neema, and are contained in two composition notebooks. In the translated books, a single month is contained on a page. Each page lists the month and year at the top and is divided in half with two columns of numbers running down the page (i.e., numbers 1 through 14 or 15 down the left-hand column and numbers 16 through 28, 29, 30 or 31 down the right-hand column). Figures, ranging from a

low of 260 to a high of 700,²² appear next to each number. There is no designation of what day of the week a specific date fell on in this translation. Nor is there a figure, at the bottom of the page which reflects the total of the figures listed on the lines above. A brief review of the translated Second Ave. store's book reveals that there was no entry for December 31, 1990, and February 1994 contained an extra entry for a 29th date. A brief review of the translation of the Third Ave. store's book reveals that both February 1992 and February 1993 contained entries for 30 days and there were entries for 31 days in November 1993. There are other erroneous entries in both books which are not noted here.

34. At the hearing, Taher admitted that he was aware of his obligation to collect sales tax on the taxable items which were sold in the stores. However, he claimed that he did not have much experience in determining which items were taxable and which items were not taxable.

35. Before the audit period began, Taher hired Abdo Gaisi to prepare the stores' sales tax returns because of his ability to read and write Arabic and his general knowledge of operations similar to petitioners'. Mr. Gaisi does not have an accounting degree; however, for 20 years he has been preparing sales tax returns for and providing miscellaneous services to clients who are mainly Yemenite grocery store owners. According to Mr. Gaisi, he advised Taher to keep cash journals, sales journals, purchase invoices and cash register tapes on a daily basis. At no time has Mr. Gaisi maintained petitioners' books.

Once every three months, either Taher or his brother visits Mr. Gaisi's office to have the stores' sales tax returns prepared. Taher testified that he provided Mr. Gaisi with all necessary books and records for preparing the sales tax returns. Mr. Gaisi testified that the sales tax returns

²²The majority of the figures appear to be between 400 to 600 for each date throughout the period contained in each translated book.

were not based on books and records but were estimates of petitioners' sales tax liability. However, in later questioning by petitioners' representative, Mr. Gaisi stated that the sales tax liability was not estimated. The record does not include any of Mr. Gaisi's work papers or any source documents which he used as the basis for the determination of taxable sales on the sales tax returns.

36. Taher stated that the stores tried to follow Mr. Gaisi's advice and maintain books and source records. However, because the Third Ave. store has been remodeled and has twice been vandalized, cash register tapes and purchase invoices have been lost, thrown out or stolen. Some miscellaneous purchase records for the Third Ave. store were submitted into the record. Maintenance of source documents was not any better at the Second Ave. store and petitioners submitted some miscellaneous purchase invoices for that store as well.

37. At the continued hearing on July 8, 1997, the Division stated that it would have one of its auditors, who could read Arabic, review copies of the two stores' sales journals written in Arabic prior to the continued hearing to be held at the Division of Tax Appeals offices in Troy, New York. The Division had Joseph Botros, an auditor with 15 years experience in auditing corporations and analyzing books and records for compliance with the sales and use tax laws and who could read Arabic, review and analyze copies of petitioners' sales journals. As a witness on December 16, 1997, Mr. Botros, based on his review of copies of the Arabic books, proffered his conclusion that portions of the books were fabricated and not contemporaneous because the books list days which do not exist in either English or Arabic, entries on the pages in the books appear to be made in the same handwriting with the same pen on the same day and corrections appear to be made using the same pen. During the hearing, the Administrative Law Judge, because of her ignorance of the Arabic language, asked Mr. Botros to review the pages of each

original book for her. In the Second Ave. store's book, Mr. Botros noted only one error, the entry for December 31, 1990 is missing. He noted the following errors in the Third Ave. store's books: July 1990 had only 30 days, not 31; February 1992 as having 30 days; February 1993 as having 30 days; November 1993 as having 31 days; an entry for January 30, 1994 is missing and February 1994 as having 30 days.

38. At the hearing, petitioners challenged the Division's basis for contending that the books presented at the hearing were not contemporaneous and a fabrication. Taher testified that, at times, he personally observed his nephew making the entries, that in Yemen every month has 30 days, that at the time these books were maintained his nephew was in the 6th or 7th grade and that the books were maintained on a daily basis.

39. After the hearing concluded on December 16, 1997,²³ petitioners' representative by letter dated December 19, 1997 made a motion to strike the testimony of Mr. Botros on the basis that he was not mentioned in the Division's hearing memorandum, petitioners should have been given ample notice that Mr. Botros was being called as an expert witness to refute the cash journal evidence, Mr. Botros was not qualified to express an opinion on the sales journals, a conflict of interest existed because Mr. Botros testified as an expert for the Division when he was an employee of the Division, petitioners were unable to get a rebuttal witness to counter Mr. Botros's testimony because the rebuttal witness was not in Troy and no one wanted to continue any more.

On January 23, 1998, the Administrative Law Judge denied petitioners' motion to strike the testimony of Mr. Botros on the grounds that petitioners were given the opportunity to

²³The record remained open to afford petitioners the opportunity to submit additional documents.

continue the hearing on December 17, 1997, but chose not to and petitioners failed to make a timely objection to Mr. Botros's testimony at the hearing. The Administrative Law Judge also advised petitioners' representative that the basis of his objections to the testimony went to the weight of the evidence, not the admissibility, and that he should address those points in his brief.

40. Petitioners submitted a page from Economic Indicators containing the consumer price index for 1987 to 1997. This publication shows that the consumer price index rose 7.3% from 1989 to 1990; 3.9% from 1990 to 1991; 1.6% from 1991 to 1992; 3% from 1992 to 1993; and 3.4% from 1993 to 1994.

41. The record includes copies of five checks drawn on Citibank checking account, account number 12033598, in the name of Himed Deli Corp., 545 Second Ave., New York, New York. Four of these checks were written in early December 1993, bear sequential numbers 573 through 576, and include one, dated December 16, 1993, payable to N.Y. Sales Tax in the amount of \$239.25. The fifth check, number 646, dated November 21, 1994, is payable to Liberty Mutual. Taher signed all of these checks.

42. On January 3, 1996, Taher and Abdo signed a Citibank signature card as partners of Himed Deli Grocery, 545 2nd Ave., New York, New York. Both Taher and Abdo, as general partners of Himed Deli Grocery, 545 2nd Ave., New York, New York, signed a Citibank Banking Agreement entitled "Partnership-Declaration Agreement."

43. Sometime in May or June of 1997, Ms. Kotlar and a fellow auditor visited the Third Ave. store and observed the New York State Liquor License and New York City License to act as a retail dealer of cigarettes on the wall. Both licenses were in the name of the corporation.

44. During the continued hearing on December 16, 1997, the Division made the following stipulation: "that in most cases there were no separate charges for sales tax on items sold during

the observation as reflected on the tally sheets. Whether the taxpayer intended to charge sales tax cannot be verified by the Division.” (Tr., p. 610.)

SUMMARY OF THE PARTIES’ POSITIONS

45. Petitioners contend that the assessments issued to Himed Deli Corporation and Abdo M. Himed and Taher M. Himed, a partnership, are invalid because the corporation, although formed, never functioned as such and was dissolved on March 24, 1993, and there was never a partnership because Abdo and Taher were merely tenants in common. Petitioners also contend that portions of the notices issued to them should be canceled because Abdo and Taher, as individuals, did not authorize an extension of the time period within which to assess them. Petitioners concede that their records were inadequate. However, petitioners contend that a one-day observation test is unreasonable; that there were other audit methods available for the auditor to use and, therefore, the assessments should be canceled in their entirety. Alternatively, petitioners argue that the tax liability is incorrect, is based on unreliable information and should at the very least be adjusted. They claim that the audit computations erroneously do not make adjustments for the fluctuation in sales, sales tax included in the merchandise price, and aberrational sales (i.e., Thursday sales on the payday of the neighborhood NYNEX office and sales during slow periods when the business first began to operate). Petitioners also argue that the inflation rate considered was less than the actual inflation rate for the period. Additionally, petitioners contend that the results of the Division’s observation tests are irrational because stores of the size of petitioners’ with no employees could not produce the volume of sales that would be necessary to generate the sales tax liability assessed. They argue that the Division should have conducted a mark-up analysis rather than the observation test. It is petitioners’ contention that the observation tally sheets upon which the auditor made the determination of daily taxable sales

are neither authentic nor genuine. They argue that the bias of the auditor tainted the audit. Petitioners also claim that the Division's rebuttal witness, Joseph Botros, is biased and his testimony that portions of petitioners' Arabic sales journals were fabrications is also erroneous. Lastly, petitioners argue that reasonable cause exists and therefore the penalties imposed in this matter should be abated.

46. The Division contends that Himed Deli Corporation operated the Third Ave. store during the audit period; therefore it was properly assessed for sales tax due before and after the date it was dissolved. In the alternative, it argues that, if it is determined that Himed Deli Corporation is not a corporation, it is a partnership. The Division claims that the issuance of notices to a corporation rather than to the partnership or tenants in common would be harmless error that does not result in the canceling of the assessments, absent a showing of prejudice. The Division maintains that Abdo and Taher were partners in a partnership that operated the Second Ave. store and, therefore, it correctly assessed them as such. It further maintains that Abdo and Taher are jointly and severally liable for the sales taxes assessed against the partnership and Taher is liable for the sales tax due from the corporation. The Division maintains that petitioners' contention that the consents do not extend the time within which to assess Abdo and Taher in their individual capacity has no merit in regard to their liability for tax due from the partnership because of their status as partners. Consents to extend the statute of limitation signed by an individual officer on behalf of a corporation do not extend the statute for the individual officers of that corporation. The Division states that Abdo and Taher are correct that the corporate consent does not extend the statute of limitations to assess sales tax against them individually. Alternatively, the Division argues that, if it is determined that Himed Deli Corporation is not a corporation or a partnership and Abdo M. Himed and Taher M. Himed,

Himed Deli, is not a partnership, the consents extend the statute of limitation for the assessment of tax in regard to the individuals who signed the consents. The Division maintains that, in that case, the rules regarding tenancy in common would apply. Therefore, the sales tax assessed against Taher for the period June 1, 1991 through November 30, 1991, would be validly extended because Taher signed the consents on July 28, 1994 as owner of both grocery stores. The sales tax assessed against Abdo would be valid only for the period June 1, 1990 through May 31, 1993, because he, as owner of both the grocery stores, signed the consents on September 20, 1993.

The Division maintains that its use of a one-day observation test is reasonable. Furthermore, the Division argues that petitioners, by merely alleging that other estimation procedures should have been employed, have failed to meet the more onerous burden of demonstrating that the audit method is unreasonable. It argues that petitioners have not produced any evidence to support their contention that the daily taxable sales recorded by the Division's auditors on the observation tally sheets are incorrect. That petitioners' mere assertions without any proof that the tally sheets are not authentic and that the auditor was biased do not constitute evidence upon which to base a determination that the audit method is unreasonable. The Division maintains that petitioners have failed to produce any evidence that the sales on the day of observation were not representative of petitioners' business operation. The Division also points out that petitioners' evidence supports the 5% inflation adjustment utilized by the Division and, therefore it should not be modified. With respect to the testimony of Mr. Botros, the Division maintains that it is reliable, competent and should be accorded great weight. The Division avers that petitioners' have failed to establish reasonable cause for the abatement of penalties. With the exception of an adjustment to corporate officer assessments based on the

expiration of the statute of limitation to assess tax against them, the Division requests that the assessments which it issued be sustained in their entirety.

47. In their reply brief, petitioners argue that Taher and Abdo are not jointly liable for the sales tax due from the partnership, nor is Taher liable for the sales tax due from the corporation. They contend that the assessments issued to the corporation should be canceled outright and any assessment issued to Taher, as the corporation's officer should likewise be canceled. Neither Taher nor Abdo were ever appointed or held any position in the corporation and the Division's allegation that the brothers were officers of the corporation is unfounded and incorrect. They maintain that the consents extending the period of limitation within which to assess sales tax were obtained for the corporation and partnership and not for Taher or Abdo either as individuals or officers of the corporation. Petitioners argue that it would be unfair and illegal to use the consents to bind the brothers, either as individuals or as corporate officers. Petitioners concede that the observation tests of sales were appropriate in this case. However, they vehemently object to the short duration of the tests (one day), the integrity of the tally sheets used as the source of the computation and the calculation methodology itself. They maintain that the ultimate assessments issued for both stores are incorrect and unreasonable. They request that the observations and the conclusions based on those observations be canceled; that new observations be ordered and the calculation of sales tax due for these two stores be radically modified. Petitioners argue that, in addition to the 5% inflation allowance, adjustments should be made for inclusion of sales tax in sales prices, and statistical variances for weather, holidays, weekends and paydays, among other things. In addition to a request for the abatement of penalties, petitioners request that all interest be abated as well.

CONCLUSIONS OF LAW

A. As noted in Finding of Fact “1”, after field audits of two grocery and delicatessen stores, the Division issued notices of determination to Himed Deli Corporation, relating to the operation of the Third Ave. store, and to Abdo M. Himed and Taher M. Himed, a partnership, relating to the operation of the Second Ave. store. Petitioners contend that the Division issued the notices to incorrect entities. They assert that the notice issued to Himed Deli Corporation should be canceled because the corporation, except for initial applications, never functioned and was dissolved on March 24, 1993. They also argue that a partnership never existed. They maintain that the brothers owned the two stores as tenants in common.

Contrary to petitioners’ assertions, the record clearly establishes that Himed Deli Corporation did function as a corporation. Himed Deli Corporation, incorporated on July 21, 1988, filed a Certificate of Registration with the Division for sales tax purposes. On this certificate, the corporation listed, among other things, its officers and the location of its corporate bank account. Business licenses were obtained in the corporate name which allowed the Third Ave. store to sell both beer and cigarettes throughout the audit period. In addition to conducting business in the corporate name, Himed Deli Corporation also filed sales tax returns. Irrespective of whether the corporation issued any stock or held any stockholders’ meetings, it did, in fact, function as a corporation.

While the corporation was dissolved on March 24, 1993, that dissolution does not impair any liability existing prior to the dissolution of the corporation (*see*, Business Corporation Law § 1006[b]). Therefore, the sales tax liability asserted in the Notice of Determination issued to Himed Deli Corporation for the period June 1, 1990 to March 24, 1993 is appropriately assessed against the corporation. The sales tax liability that accrued after March 24, 1993, is also properly

assessed against the corporation. The record clearly establishes that Himed Deli Corporation continued doing business after its March 24, 1993 dissolution. After that date, officers on behalf of Himed Deli Corporation continued to file sales tax returns, issue checks, sign consents extending the period of limitations and maintain and display licenses in the corporate name. Since Himed Deli Corporation continued doing business as a corporation, it cannot seek to avoid the sales tax liability reflected in the corporate notice for the period after its dissolution (*see, Laurendi v. Cascade Development Co.*, 5 Misc 2d 688, 165 NYS2d 832, *affd* 4 AD2d 852, 167 NYS2d 240).

In sum, the Division properly issued to Himed Deli Corporation the Notice of Determination for the sales tax due with respect to the Third Ave. store.

B. Petitioners' argument that Abdo Himed and Taher Himed operated the Second Ave. store as tenants in common rather than as a partnership is also without merit. Based on my review of the record, I conclude that Taher and Abdo operated the Second Ave. store as a partnership.

"A partnership is an association of two or more persons to place their money, efforts, labor or skill, or some or all these in lawful commerce or business and to divide the profits and bear the loss in certain proportions" (*Hanlon v. Melfi*, 102 Misc 2d 170, 423 NYS2d 132, 134). The fact that there is no written agreement of partnership is not conclusive in determining whether or not a partnership exists but is an element to be taken into consideration. An indispensable requirement of a partnership is a mutual promise or understanding of the parties to share in the profits of the business and submit to the burden of making good the losses (*id.*).

The evidence clearly establishes that Taher and Abdo had an agreement to work and manage the Second Ave. store, as well as share in its profits and losses. Both Taher and Abdo on

separate and numerous occasions signed documents before, during and after the audit period referring to themselves as partners or as general partners. The Division assessed the Second Ave. store as a partnership because of the way it was listed on numerous sales tax records filed by or on behalf of Abdo Himed and Taher Himed. The evidence clearly supports the Division's conclusion that Abdo Himed and Taher Himed conducted the operation of the Second Ave. store as a partnership. Therefore the Division properly assessed Abdo Himed and Taher Himed as a partnership.

C. Tax Law § 1133(a) states that: "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article"

Tax Law § 1131(1) defines a "person required to collect any tax imposed by this article [Article 28]" to include:

any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article; and any member of a partnership.

D. Petitioners argue that the Division incorrectly issued assessments to Taher Himed and Abdo Himed as individuals. They assert that, since they were tenants in common with respect to the operation of both stores, only one-half of the amounts of sales tax due from the corporation and partnership should be allocated to each of them. They further argue that since Taher was not an officer of the corporation, the assessment issued to him as the responsible officer of Himed Deli Corporation should be canceled.

E. With respect to the Second Ave. store, I have determined that Abdo M. Himed and Taher M. Himed were members of the partnership that operated that store. Pursuant to Tax Law

§ 1131(1), Taher Himed and Abdo Himed, as partners, are under a duty to act for the partnership in complying with the requirements of Articles 28 and 29 of the Tax Law (*see*, Partnership Law § 26[2]). As such, Taher Himed and Abdo Himed are jointly and severally liable for the sales taxes of the partnership.

F. Petitioners argue that Taher is not an officer of the corporation and therefore the assessment issued to him as the responsible officer of Himed Deli Corporation should be canceled. It is clear from the record that Taher was an officer of Himed Deli Corporation. The issue then becomes whether he was under a duty to act for the corporation in complying with the requirements of Articles 28 and 29 of the Tax Law.

G. It has been held that corporate office does not, per se, impose sales tax liability upon an officeholder (*see, Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427, 430; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed* 214 AD2d 857, 625 NYS2d 343, *lv denied*, 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is a responsible officer must be determined based upon the particular facts of each case (*see, Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448; *Chevlowe v. Koerner, supra*, 407 NYS2d at 429; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). Factors stated by the Division's regulations are: whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

The Tax Appeals Tribunal, in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), stated:

[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (*Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 564, 565; *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Vogel v. New York State Dept. of Taxation & Fin.*, *supra*, 413 NYS2d 862, 865; *Chevlowe v. Koerner*, *supra*, 407 NYS2d 427, 429; *Matter of William D. Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin*, *supra*; *Matter of Autex Corp.*, *supra*).

H. It is clear from the record that Taher, as officer, signed sales tax returns for the corporation, was authorized to and did write checks on behalf of the corporation, had authority and control over the finances of the corporation, actively participated in the operations of the Third Ave. store and shared in the store's profits.

The evidence in this case supports the conclusion that Taher had or could have had control over corporate affairs and therefore was under a duty to act for Himed Deli Corporation in complying with Articles 28 and 29 of the Tax Law.

I. Tax Law § 1147(c) provides, in pertinent part:

[w]here, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

On September 20, 1993, Abdo M. Himed signed a consent extending the period within which to issue an assessment against Himed Deli Corporation for the period June 1, 1990

through May 31, 1993 to September 20, 1994 (*see*, Finding of Fact “7”). On July 28, 1994, Taher M. Himed signed a consent extending the period within which to issue an assessment against Himed Deli Corporation for the period June 1, 1990 through November 30, 1991 to March 20, 1995 (*see*, Finding of Fact “20”). Consents extending the period of limitations for the partnership listed as “Abdo M. Himed and Taher M. Himed Deli” and “Himed Deli Corporation a/k/a Abdo M. Himed and Taher M. Himed” were signed by Abdo M. Himed and Taher M. Himed on September 20, 1993 and July 28, 1994, respectively, that extended the period of limitations for June 1, 1990 through November 30, 1991 to March 20, 1995 (*see*, Findings of Fact “7” and “20”).

Petitioners contend that the consents, obtained from either the corporation or the partnership, do not extend the time within which to assess Taher and Abdo in their individual capacities.

Consents to extend the statute of limitations signed by an individual officer on behalf of a corporation do not extend the statute of limitations for the individual officers of the corporation (*see, Matter of Bleistein*, Tax Appeals Tribunal, July 27, 1995). In the instant case, on February 21, 1995, the Division issued to Taher Mohamed Himed, as officer of Himed Deli Corp., a Notice of Determination for the period June 1, 1990 through May 31, 1994. Since the Division obtained consents from the corporation only with respect to the period June 1, 1990 through November 30, 1991, that portion of the Notice of Determination (Notice No. L-010069294-1) issued to Taher, as officer of Himed Deli Corporation, must be canceled for the period June 1, 1990 through November 30, 1991.

Petitioners are incorrect, the consents executed on behalf of the partnership do extend the statute of limitations for individual partners. A partnership “is an association of two or more

persons to carry on as co-owners a business for profit” (Partnership Law § 10[1]). Every partner is an agent for the partnership for the purpose of its business, and the authorized act of every partner, including the execution in the partnership name of any instrument, binds the partnership (Partnership Law § 20[1]). Partners are jointly liable with respect to their contractual obligations (*see*, Partnership Law § 26[2]; *see also*, ***Patrickes v. J. C. H. Service Stations, Inc.***, 180 Misc 917, 41 NYS2d 158, *affd* 180 Misc 927, 46 NYS2d 233, *app den* 266 App Div 924, 44 NYS2d 472). However, each partner also has an absolute liability for the whole amount of every debt due from the partnership, which although originally founded upon joint contract, may be separate as to its effects (*see*, 16 NY Jur2d, Business Relationships § 1409; ***Bank of Commerce v. DeSantis***, 144 Misc 2d 491, 451 NYS2d 974; ***Patrickes v. J. C. H. Service Stations, supra***.) Each partner is still liable in equity in the event of the need to reach his several estate (***Bank of Commerce v. DeSantis, supra***). “This individual liability dates back to the time when the obligation was incurred, and arises simultaneously with the joint liability, so that with respect to the ultimate rights of the creditor, in theory of law, the contractual obligation of a partnership is incurred by all and by each” (***Patrickes v. J. C. H. Service Stations, supra***, 41 NYS2d at 167).

In Conclusion of Law “B”, I concluded that Abdo Himed and Taher Himed conducted the operation of the Second Ave. Store as a partnership. This conclusion is based, in part, on the numerous tax documents, including the two consents, signed by both Abdo and Taher on behalf of the Second Ave. store (*see*, Findings of Fact “5”, “7” and “20”). Since the consents extended the statute of limitations for the partnership, they also extended the statute of limitations for each of the partners. “Their individual liability arises out of the notion of a partnership and is an incident thereof” (***Bank of Commerce v. DeSantis, supra***, 451 NYS2d at 978). Accordingly, the

Division properly issued that portion of the Notice of Determination (Notice No. L-010069292-3) issued to Taher, as a partner of Abdo M. Himed and Taher M. Himed, a partnership, for the period June 1, 1990 through November 30, 1991.

J. It is well established that every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division of Taxation's estimating tax due (Tax Law § 1138[a]). To determine the adequacy of a taxpayer's records, the Division of Taxation must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109; *Matter of King Crab Rest. v. State Tax Commn.*, 134 AD2d 51, 522 NYS2d 978). The purpose of such an examination is to determine whether the records are so insufficient as to make it virtually impossible to verify taxable sales receipts and conduct a complete audit. When estimating sales tax due, the Division must adopt an audit method that will reasonably calculate the amount of taxes due (*see, Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451). Whether the audit method used was "reasonably calculated to reflect the taxes due" (*Matter of W.T. Grant Co. v. Joseph, supra*, 159 NYS 2d at 157) can only be determined based on information made available to the auditor before the assessment is issued (*Matter of Queens Discount Appliances,*

Inc., Tax Appeals Tribunal, December 30, 1993; *Matter of House of Audio of Lynbrook*, Tax Appeals Tribunal, January 2, 1992).

K. Petitioners concede that the use of the observation tests of sales was appropriate in this case. However they are challenging the assessments resulting from the one-day observation tests on a number of grounds.

First, petitioners assert that it is unreasonable to extrapolate the results of a one-day observation test over a four-year audit period. The courts have upheld the use of observation tests on numerous occasions (*see, Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance*, 205 AD2d 989, 613 NYS2d 967; *Matter of Sarantopoulos v. Tax Appeals Tribunal*, 186 AD2d 878, 522 NYS2d 102; *Matter of Vebol Edibles v. State of New York Tax Appeals Tribunal*, 162 AD2d 765, 577 NYS2d 678, *lv denied* 77 NY2d 803, 567 NYS2d 643; *Matter of Club Marakesh v. State Tax Commission*, 151 AD2d 908, 542 NYS2d 881, *lv denied* 74 NY2d 616, 550 NYS2d 276; and *Matter of Meskouris Bros., Inc. v. Chu, supra*). Contrary to petitioners' contention, it is reasonable to extrapolate the results of a one-day observation test over a multiple-year audit period. (*See, Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance, supra*).

Second, they claim that the stores' sales on the day of the observations were greater than usual and therefore were not representative of petitioners' business operations for the entire audit period in issue. They contend that Thursdays and Fridays are the busiest days of the week at both stores and that sales on weekends and holidays are significantly lower than other days. In addition, they claim that, at the beginning of the audit period, the stores were in the start-up phase and daily sales were much lower. In support of these claims, petitioners offered the testimony of petitioner Taher Himed and two sales journals written in Arabic, along with their

English translations. Since Mr. Himed was the only witness to testify as to the general operation of both stores, his testimony was critical. As to the testimony of Mr. Himed, I do not find it to be reliable. His testimony at times was vague, evasive and contradictory. The only documentary evidence concerning daily sales for both stores are the two sales journals written in Arabic. It is impossible to determine whether these journals contain accurate and true records of either store's sales for the audit period. Neither the individuals who recorded the figures in these books, nor the source documents, i.e., the daily cash register tapes, were presented at the hearing in this matter. Furthermore, the English translations of the books contain numerous errors which raise questions as to how diligent petitioners were in recording total gross sales at either store. As for petitioners' assertion that, at the beginning of the audit period, both stores were in their start-up phase, it is not supported by the record. The Third Ave. store was purchased by Himed Deli Corporation, in November of 1988, from Mohamed K. Himed, who had been operating it for 9 or 10 years prior to the sale. While the Second Ave. store was opened in 1988 or 1989, there is no evidence of what daily sales actually were in 1990, other than Mr. Himed's unreliable testimony and unsubstantiated records. Given the unreliability of Mr. Himed's testimony with regard to the stores' daily sales, both generally and specifically during the audit period, I cannot agree that the one-day observation test was unreasonable and that the audited taxable sales do not reflect daily sales throughout the entire audit period. Petitioners have not met their obligation of proving, by clear and convincing evidence, that the result of the method used was unreasonably inaccurate or that the amount of the tax assessed is erroneous (*Matter of Meskouris Bros. v. Chu, supra*). Furthermore, it is well established that where a taxpayer has failed to maintain accurate, complete and verifiable records, exactness in the audit result is not required and the consequences of a taxpayer's recordkeeping failures will weigh heavily against it (*id.*).

Third, petitioners contend that the one-day observation tally sheets for each store are not authentic or genuine and reflect the auditor's bias. Petitioners' mere assertions without any proof that the tally sheets are not authentic and that the auditor was biased does not constitute evidence upon which to base a determination that the audit method is unreasonable. (*Matter of Mera Delicatessen, Inc.*, Tax Appeals Tribunal, November 2, 1989; *see also, Matter of Del's Mini Deli, Inc., v. Commissioner of Taxation and Finance, supra*). Petitioners have not produced any evidence to support their contention that the daily taxable sales as recorded by the Division's auditors are incorrect. Therefore, petitioners have failed to demonstrate by clear and convincing evidence that the audit method or results are unreasonable (*see, Matter of Robritt Liquor Store, Inc.*, Tax Appeals Tribunal, December 27, 1991). Furthermore, my review of the original observation tally sheets for both stores does not reveal any alteration by Ms. Kotlar of any of the other auditors' recorded observations, other than deletion of nontaxable sales and the darkening of specific light entries.

Lastly, petitioners argue that the Division erred in not making an adjustment for inclusion of sales tax in the audited taxable receipts. The regulation at 20 NYCRR 532.1(b) states, "[w]henever the customer is given any sales slip, invoice, receipt, or other statement or memorandum of the price, amusement charge, or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him."

There is contradictory evidence as to whether petitioners provided cash register tapes to their customers. If they did, petitioners were required to separately state the sales tax charged on the printed receipts. The failure to separately state the sales tax charge renders the entire receipt presumptively taxable (*see, LaCascade, Inc. v. State Tax Commission*, 91 AD2d 784, 458 NYS2d 80; *Matter of S & K Smoke Shop, Inc.* Tax Appeals Tribunal, July 18, 1991).

Petitioners have failed to present any evidence or legal arguments in support of their contention that the sales prices of any of the items sold included sales tax. On a few occasions during the observation tests, petitioners did collect a separately stated charge for sales tax on the purchase price of the merchandise.

20 NYCRR 532.1(b)(4) allows the absorption of tax where no written receipt is given to the customer. This rule is applicable only as long as the customer is made aware of the inclusion of sales tax in the sales price by visibly displaying a sign to that effect (*see, Matter of Auriemma*, Tax Appeals Tribunal, September 17, 1992). All of the auditors who conducted the observation tests testified that they did not observe at either store a sign or other type of written statement declaring the sales price included sales tax. Since no such signs were displayed at petitioners' stores, the Division correctly calculated petitioners' sales tax liability without making an adjustment for the inclusion of sale tax in the purchase price.

L. Petitioners also argue that, in addition to the 5% inflation adjustment allowed by the Division, allowances should also be made for seasonal weather, holidays, weekends, paydays and other variances. Petitioners' only evidence concerning daily sales consisted of Mr. Himed's unreliable testimony and the unsubstantiated sales journals. The Division allowed a 5% inflation adjustment for yearly inflation, price increases, weather variations and popularity variances. Evidence submitted by petitioners concerning the consumer price index shows that, during the audit period, the consumer price index rose less than 5% per year. Since the actual inflation rate was less than 5% per year, and petitioners failed to produce clear and convincing evidence to warrant any further allowances, I see no reason to make any further adjustments.

M. Since petitioners' books and records were inadequate, the Division was required to select an audit method reasonably calculated to reflect the taxes due, and upon their challenge to

the assessments petitioners bore the burden to establish by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (*Matter of Club Marakesh v. State Tax Commission, supra*). Petitioners have failed to sustain their burden of proving that either the audit methodology or the amount of tax assessed was erroneous.

N. Penalties were also imposed in this matter under two different provisions of Tax Law § 1145. The first is that set forth in Tax Law § 1145(a)(1)(i) which states, in pertinent part, as follows:

Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding thirty percent in the aggregate.

Tax Law § 1145(a)(1)(iii) provides that if the failure or delay was due to reasonable cause and not due to willful neglect, penalty and additional interest shall be remitted. Reasonable cause includes any cause for delinquency which would appear to a person of ordinary prudence and intelligence as reasonable cause for the delay in filing a sales tax return and paying the tax imposed under Articles 28 and 29 of the Tax Law (20 NYCRR 536.5[c][5]).

Petitioners contend that penalties should be abated because they relied on honest estimations of their sales tax liability by a qualified accountant. They further argue that Taher Himed, an almost illiterate man, who was prominently involved in the businesses, fully relied upon the expertise of the accountant. They claim that Taher Himed did follow the instructions of the accountant as much as he could, depending on his resources and means.

I find that Division properly assessed penalties in this matter. First, penalties are appropriate in this case because there is a substantial discrepancy between the amount of tax

reported and the amount of tax determined due on audit, and petitioners relied on estimates rather than their books and records in filing the sales tax returns (*see, Matter of S.H.B. Super Markets, Inc. v. Chu, 135 AD2d 1048, 522 NYS2d 985*). Second, the record clearly establishes that Taher Himed, while limited in formal education, is an experienced businessman having been involved in the running of the Third Ave. store since 1978 or 1979. It was not Mr. Himed's lack of education that resulted in petitioners' failure to maintain books and records as advised by their accountant. Rather, it was petitioners' failure to follow the advice of their accountant.

Petitioners have also been assessed penalty pursuant to Tax Law § 1145(a)(1)(vi) for omission of greater than 25% of the tax due. Since the initial issue of penalties assessed pursuant to Tax Law § 1145(a)(1)(i) has been determined against petitioners herein, this add-on penalty must also be sustained in the absence of a showing of reasonable cause.

O. The petitions of Himed Deli Corporation, the partnership of Taher Himed and Abdo M. Himed and Taher M. Himed, as an individual, are granted to the extent granted in Conclusion of Law "I" and in all other respects are denied. Notices of Determination dated February 9, 1995 (Notice Nos. L-010061123-3 and L-010061124-2) and Notice of Determination dated February 21, 1995 (Notice No. L-010069292-3) are sustained; and Notice of Determination dated February 21, 1995 (Notice No. L-010069294-1) is to be modified in accordance with Conclusion of Law "I" and in all other respects is sustained.

DATED: Troy, New York
January 21, 1999

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE